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No. 82-245

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANDREA CISNEROS JALIFI, Widow,
Appellant,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA, and
DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,
Appellees.

On Appeal From the Supreme Court of Arizona

Jurisdictional Statement

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QUESTIONS PRESENTED

1. What level of scrutiny should be afforded a state statute withdrawing a vested property right solely because of the non-resident alien status of its holder?
2. Whether a state statute intended to ease administration and preserve the fisc may constitutionally reduce by forty percent the workmen's compensation death benefits to non-resident alien dependents of a United States citizen.

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In the Supreme Court of the United States

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ANDREA CISNEROS JALIFI, Widow,
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VS.

THE INDUSTRIAL COMMISSION OF ARIZONA, and
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On Appeal From the Supreme Court of Arizona

Jurisdictional Statement

OPINIONS BELOW

The opinions of the Arizona Court of Appeals, on the merits and denying rehearing, and of the Arizona Supreme Court, denying review, have not yet been officially reported. A copy of each is set forth in the appendix hereto.

JURISDICTION

The decision of the Arizona Supreme Court, denying review and thus affirming and making final the appellate court's determination that appellant's workmen's compensation death benefits could constitutionally be reduced, pursuant to a state statute, where the dependent recipient thereof is neither a citizen nor a resident at the time of death, was entered on May 11, 1982. See appendix.

A NOTICE OF APPEAL to this Court was duly filed in the Supreme Court of Arizona on July 22, 1982. An AMENDED NOTICE OF APPEAL was filed in the Arizona Court of Appeals on July 27, 1982. This appeal is being docketed in this Court within 90 days from the denial of review below.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). *See Harrison v. Denckla*, 357 U.S. 235, 244 (1957); *LaCross Tel. Corp. v. Wisconsin Board*, 336 U.S. 18 (1948).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution, Section One:

> "... nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

8 A.R.S. § 23-1046(c) at 595:

> "A death benefit paid to an alien not residing in the United States shall be only sixty percent of the amount specified in this section."

QUESTIONS PRESENTED

1. What level of scrutiny should be afforded a state statute withdrawing a vested property right solely because of the non-resident alien status of his holder?
2. Whether a state statute intended to ease administration and preserve the fisc may constitutionally reduce by forty percent the workmen's compensation death benefits to non-resident alien dependents of a United States citizen.

STATEMENT OF THE CASE

Miguel Jalifi was a United States citizen on May 11, 1978, when he died by industrial accident arising out of and in the course and scope of his employment. Mr. Jalifi was survived by his wife and their three minor children. On December 8, 1978, the Industrial Commission of Arizona entered its Findings and Award of full dependent's benefits based on an average monthly wage of approximately $650. That award was protested by the employer and by Findings and Award of August 13, 1979, the Industrial Commission re-determined Miguel Jalifi's average monthly wage at $450. Thereafter, on October 9, 1979, the Industrial Commission entered its Amended Findings and Award for Death Benefits.

That decision concluded that Mrs. Andrea Jalifi was a non-resident alien when her husband died and reduced that portion of the award attributable to her by forty percent pursuant to A.R.S. § 23-1046(c). Appellant's total award was thereby reduced from about $160 to $95 monthly. On December 7, 1979, the widow filed a request for hearing and on April 8, 1980, the Industrial Commission entered its award affirming the October 9, 1979 decision. Appellant then requested review and on May 9, 1980 the award of April 8, 1980 was affirmed.

A timely petition for special action followed, challenging the constitutionality of Arizona's benefit reduction scheme, *see* A.R.S. § 23-1046(c), on equal protection, supremacy, and due process grounds. The decision of the Arizona Court of Appeals was filed on March 11, 1982. It held that A.R.S. § 23-1046(c) did not in any way offend the United States Constitution. Appellant's timely motion for rehearing was denied on April 23, 1982, and on May 11, 1982 the Arizona Supreme Court denied appellant's timely petition for review. On July 22, 1982 appellant noticed the Court of this appeal, thereafter amending said notice on July 27, 1982. See appendix.

THE QUESTIONS ARE SUBSTANTIAL

Arizona's Workmen's Compensation Act contemplates reimbursement of a worker injured during and in the course of his employment for the earning capacity lost thereby. *Bugh v. Bugh*, 125 Ariz. 190, 608 P2d 329 (App. 1980) Under the act, the injured worker need not prove fault or forego compensation due to insolvency of the tortfeasor. A.R.S. § 23-907; *Yates v. Industrial Commission*, 116 Ariz. 125, 568 P2d 432 (App. 1977); A.R.S. § 23-981.

The worker, or, in the event of death, his dependents, however, may not pursue a tort claim for relief in addition to an entitlement under the Workmen's Compensation Act. A.R.S. § 23-901, *et. seq.* In the case of an insured employer, the worker must actually elect to forfeit the workmen's compensation benefits prior to his injury in order to obtain jurisdiction in a trial court after the injury. If the employer has no policy, the worker may elect after he has sustained an injury. In either case, however, the election is final. A.R.S. § 23-906; *Jackson v. Northland Const. Co.*, 111 Ariz. 391, 531 P2d 144 (1975); *Mariscal v. American Smelting & Refining Co.*, 111 Ariz. App. 148, 548 P2d 412 (1976).

As such, it is clear that appellant, and all those similarly situated, have a property interest in the benefits of the Workmen's Compensation Act, just as they would have had an interest in a judgment if they had pursued a tort cause of action. *See also Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interest in legitimate claim of entitlement to a benefit); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972) (Property interest where rules support claim of entitlement).

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution affords its benefits

to any person entitled to bring an action in the discriminating state's courts. *Kentucky Finance Corporation v. Paramount Auto Exchange*, 262 U.S. 544, 550 (1923). Because the event giving rise to her claim occurred in Arizona, Mrs. Jalifi may challenge the non-resident alien classification that withdraws a portion of her otherwise vested claim for benefits. *See Mathew v. Diaz*, 426 U.S. 67 (1976); *Jonnson v. Eisentrager*, 339 U.S. 763 (1950); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Some confusion nevertheless exists in that non-resident aliens have occasionally been denied an opportunity to litigate their equal protection claims. *See, e.g., DeTenorio v. McGowan*, 510 F2d 92, 101, *reh. denied*, 513 F2d 294 (5th Cir.) *cert. denied*, 423 U.S. 877 (1975); *Carmen Pedrazza, et al, v. Sid Fleming Contractor, Inc.*, 94 NM 59, 607 P2d 597, 600 (1980). Presumably, however, the legitimate claim of entitlement in the instant case marks its distinction from *DeTenorio* and *Pedrazza*.

More importantly, in *Pedrazza, supra*, the New Mexico Supreme Court upheld the constitutionality of its law disallowing all workmen's compensation benefits to non-resident aliens, even while noting that "clearly, the plaintiffs are being subjected to hostile legislation. . ." Id. the lower court holding in the instant case similarly upholds the constitutional validity of a statute discriminating against non-resident aliens. See appendix.

In contrast, California seemingly would not permit the classification. *See generally Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491 (1916). Neither would Kansas. In *Vietti v. George K. Mackie Fuel Co.*, 109 Kansas 179, 197 Pac. 881 (1921), that state's Supreme Court held that the alien dependents of the deceased worker were entitled to full benefits under Kansas Workmen's Compen-

sation Act by virtue of a United States treaty with Italy. However, in discussing the Act's limitation on benefits for dependent aliens, the Court stated:

> It may be added that the statutory limitation is also in contravention of the fourteenth amendment of the federal constitution, which provides. . . [equal protection guarantees], 197 Pac. at 883.

Some conflict does therefore exist among the states on the precise issue presently before this Court, though *Pillsbury* and *Vietti, supra,* arguably turn upon differing facts and issues. As such, current authority seems to deny equal protection of worker's compensation law to non-resident aliens. The more well-reasoned view, however, would not find even a rational means for promoting a legitimate state interest in the classification:

> It may reasonably be thought that the best interests of the state, of the employers of labor, and those employed, as well as of the public generally, are promoted by imposing upon the industry or the public the burden of industrial accident and some such theory lies at the bottom of all workmen's compensation statutes (*Western Indemnity Co. v. Pillsbury, supra*)—the residence and the citizenship of the injured worker, or (if he shall have met death) of his dependents, are factors entirely foreign to the discussion. The legislature has determined that the employment of labor in given pursuits entails upon the employer certain responsibilities towards the persons performing the labor and those dependent upon them. There is no constitutional or rational ground for limiting the benefits of this legislative scheme to citizens or residents of this state. *Western Metal v. Pillsbury, supra,* 156 Pac. at 495.

The confusion evident in this field has in part been occasioned by uncertainty as to the proper standard of consti-

tutional review. The instant classification arguably cuts across both alienage and national origin and strict scrutiny should therefore be afforded. *E.g., Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976); *Sugarman v. Dougal,* 413 U.S. 63 (1972); *In re Griffiths,* 413 U.S. 717 (1973); *Graham v. Richardson,* 403 U.S. 365 (1971).

This Court, however, has not previously considered what scrutiny should be afforded to laws that discriminate against non-resident aliens, or to what extent that determination is affected by the right alleged to have been denied by the classification. Analogously, this Court has recently indicated that if the right denied by a classification relates to the operation of a government entity, the otherwise strict scrutiny may be relaxed. *See Ambach v. Norwick,* 441 U.S. 68 (1979); *Foley v. Connelie,* 435 U.S. 291 (1978); *Sugarman, supra. See Lehndorff Geneva, Inc. v. Warren,* 74 Wis.2d 369, 246 NW2d 815 (1976). The two jurisdictions which previously decided the non-resident alien scrutiny issue reach different results. *Compare Lehndorff Geneva, supra* (rational basis test for statute limiting land ownership by non-resident alien; no vested entitlement), *with Sailer v. Tonkin,* 356 F.Supp. 72 (Virgin Islands 1973) (Strict scrutiny for statute denying injury compensation to non-resident aliens; right accrued by statutory entitlement).

In the instant case, the lower court apparently followed *Lehndorff Geneva, supra,* notwithstanding the presence of a statutory entitlement. See appendix. *See also Doe v. Plyer,* 458 F.Supp. 569 (1978). Insofar as many states have enacted statutes tending to classify non-resident aliens, it is crucial to the jurisprudence of every jurisdiction that some test be established to guide selection of an appropriate standard of review.

A strict scrutiny analysis of classifications like that involved in the instant case would clearly affect the outcome of a constitutional challenge. A.R.S. § 23-1046(c) allegedly eases administration of the workmen's compensation act by rewarding insurance companies for the difficulties involved in spying on possibly fraudulent claimants in foreign countries. See appendix. Simpler, fairer, and more effective methods of preventing fraud, however, are easily conceived in the case of an injury resulting in death. Also, A.R.S. § 23-1046(c) purportedly preserves the fisc by denying entitlements to persons who probably would not become a public charge notwithstanding the denial, and by limiting the benefits where the person entitled is residing in an area having a lower cost of living. See appendix. Even if fiscal considerations are compelling, *but see Shapiro v. Thompson*, 394 U.S. 618 (1968), alternatives are available which are both more proper and effective and also less restrictive. Moreover, the cost of living assertion is particularly illusory and question begging. If a dead worker's dependents have been residing in Mexico, their standard of living will be a function of the cost of living there and the income of the wage earner. Any diminution of a death benefit, especially a forty percent diminution, is nothing more than an arbitrary reduction of the support previously relied upon by the decedent's dependents. A cost of living adjustment that was fairly applied would take effect only if the dependents moved to a new location after the death benefit was awarded.

Further, this Court should note that Mexicans working in the United States typically earn minimal wages. The maximum workmen's compensation award is typically two thirds of that wage. Another forty percent diminution is a devastating blow to the support of a decedent's dependents.

Aliens frequently come into the United States, contribute to its economy, pay taxes, and have wrongs perpetrated against them. Some aliens commute to jobs in the United States from their homes to the north and south of our border. Many United States citizens have alien families which they are unable to support in the United States, even though the families could lawfully reside here. Inevitably, some event occurring in the United States will touch the lives of a non-resident alien, and give rise to a lawful claim.

The resolution of these claims is a matter of significant importance not only to the aliens particularly affected, but also to the economic well-being of the United States in general. *See Saxbe v. Bustus,* 419 U.S. 65 (1974); *Gonzales v. Workmen's Compensation Appeals Board,* 49 Cal. App. 3rd 280, 122 Cal. Rptr. 515 (1975). It is apparent that there can be no uniformity in the several jurisdictions, and no reasoned application of the law, until this Court considers the parameters of equal protection guarantees for persons classified as non-resident aliens.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix

In the Court of Appeals
State of Arizona

Division One

1 CA-IC 2417

DEPARTMENT C

ICA Claim No. 449-44-2966

ANDREA CISNEROS JALIFI, widow,
Petitioner,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,
Respondent Employer.

ORDER

The above-entitled matter was duly submitted to the court. The court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the clerk.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the opinion, be sent to each party appearing herein or the attorney for such party and to Donald H. Bayles, Administrative Law Judge.

DATED this 11th day of MARCH, 1982.

/s/ WILLIAM E. EUBANK
William E. Eubank, Presiding Judge
Department C

The foregoing directives were complied with on March 11, 1982, by mailing the required to:

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In the Court of Appeals
State of Arizona

Division One

1 CA-IC 2417

DEPARTMENT C

ANDREA CISNEROS JALIFI, widow,
Petitioner,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,
Respondent Employer.

OPINION

Special Action—Industrial Commission

ICA CLaim No. 449-44-2966

Administrative Law Judge Donald H. Bayles

AWARD AFFIRMED

Taylor & Kamper
By: Don F. Schaar
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and
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The Industrial Commission of Arizona — Phoenix

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FROEB, Judge

Miguel Jalifi died in an automobile accident arising out of and in the course of his employment on May 11, 1978. On August 13, 1979, Findings and Award for Death Benefits was entered granting petitioner Andrea Jalifi, his widow, full widow's benefits under Arizona's workmen's compensation law in the amount of $157.50 per month. Before it became final, the award was amended on October 9, 1979, reducing Andrea Jalifi's benefits to sixty percent of the full widow's allowance based upon the finding that she was an alien not residing in the United States at the time of her husband's death. Two of the deceased's three minor children pursued their rights to workmen's compensation benefits. Since the children have duality of citizenship, they were awarded full benefits pursuant to A.R.S. § 23-1046(A)(5).

A request for hearing was filed by the petitioner and, on April 8, 1980, the administrative law judge entered his Findings and Award affirming the Commission's amended October 9, 1979, decision. This decision was based upon memoranda which were filed by the petitioner and respondent-employer in lieu of a formal hearing. Petitioner then filed a request for review on April 22, 1980. The administrative law judge affirmed his decision by an award dated May 9, 1980, and this Special Action—Industrial Commission followed.

A.R.S. § 23-1046(A)(2) provides death benefits for the widow of a deceased worker in the amount of "thirty-five percent of the average wage of the deceased, . . ." Petitioner challenges the constitutionality of A.R.S. § 23-1046(C), which provides for a reduction of benefits in her case:

> A death benefit paid to an alien not residing in the United States shall be only sixty percent of the amount specified in this section.

Specifically, petitioner claims that A.R.S. § 23-1046(C) establishes an unconstitutional classification "on the basis of alienage" and thereby deprives her of the equal protection of the laws. She also claims a denial of procedural due process.[1]

It is clear that aliens within the jurisdiction of the state are entitled to the equal protection of the laws. *Mathew v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Furthermore, resident aliens enjoy the "heightened judicial solicitude of a suspect class." *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). This status is not afforded to *non-resident* aliens, however. *DeTenorio v. McGowan*, 510 F.2d 92 (5th Cir. 1975), U.S. *cert. den.* 423 U.S. 877, 96 S.Ct. 150, 46 L.Ed.2d 110 (1975); *Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M. 59, 607 P.2d 597 (1980). The fourteenth amendment to the United States Constitution provides that "No state shall . . . deny to any person *within its jurisdiction* the equal protection of the laws." (Emphasis added.) As noted in *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950):

> [I]n extending constitutional protection beyond the citizenry, the Court has been at pains to point out that

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1. Petitioner originally argued that the amended award reducing her benefits was also a violation of the supremacy clause because she claimed she was a green-carded alien, and that under the Federal Immigration and Nationality Act, a green-card holder enjoys the status of a *resident* alien. 8 U.S.C. § 1101(a) (1976 & Supp. III 1980). *See* Gonzales v. Workmen's Compensation Appeals Board, 49 Cal.App.3rd 280, 122 Cal.Rptr. 515 (1975). At oral argument, however, petitioner considered that she was not in fact a green-card holder and therefore waived the supremacy clause argument.

> it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act.

339 U.S. at 771, 70 S.Ct. at 940, 94 L.Ed. at 1262.

The argument is raised by respondents that the equal protection does not apply to petitioner in this case. We need not decide this question, however, because we find that, even if we assume the equal protection clause applies, the statutory provision in question does not violate it.[2] We turn then to a consideration of the standard by which the statute in question should be reviewed.

Alien-based classification has historically been subject to strict scrutiny for purposes of equal protection analysis. *Graham v. Richardson*, *supra*; *Yick Wo v. Hopkins*, *supra*. However, review of the "alien" cases commencing with *Yick Wo*, *supra*, indicates that the underlying rationale of those decisions is that *resident* aliens, like citizens, "pay taxes, serve in the military and contribute to economic growth." *Lehndorff Geneva, Inc. v. Warren*, 74 Wis.2d 369, 246 N.W.2d 815 (1976). *See Johnson v. Eisentrager*, *supra*. Thus, since resident aliens share the burdens of society, the state has a heavy burden to bear when it deprives them of equal benefits. *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

In *Lehndorff*, *supra*, the Wisconsin Supreme Court summarized the "alien" cases as follows:

> In summary, the cases which called for a "heightened judicial solicitude" toward aliens dealt with statutes which obstructed the normal affairs of life even though the national government had determined that the

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2. Unlike the non-resident aliens in *De Tenorio*, *supra*, and *Pedrazza*, *supra*, petitioner is conferred some benefits by the Arizona State Legislature, which may provide the requisite nexus to bring her within the purview of the equal protection clause. We therefore decline to dispose of the equal protection issue on the basis that its protection does not apply to petitioner.

> aliens in question could live in this country. As residents, these aliens bore the burdens imposed by society but not the sought-after benefits. Nor could they participate in the political process, which is the normal avenue of redress for a citizen unhappy with a governmentally-imposed burden. In this type of situation, the court repeatedly held, "heightened judicial solicitude" is appropriate.

Id. at 382-83, 246 N.W.2d at 822. The Wisconsin court determined, however, that none of these considerations applied to a state law limiting *non-resident* alien ownership of land. Because the non-resident aliens in that case did not share the burdens of citizens, except for taxes paid in connection with the ownership of the land, the court concluded that non-resident aliens did "not possess the characteristics which warrant heightened judicial solicitude. . . . " *Id.* at 387, 246 N.W.2d at 824.

We agree with this reasoning and find it applicable to the petitioner in the case before us. Petitioner was not a resident of the United States on the date of her husband's death. In fact, since her marriage to Miguel Jalifi, petitioner has always resided in Mexico. Petitioner therefore shares none of the "duties and burdens" which resident aliens have in common with citizens of the United States. Consequently, her challenge to A.R.S. § 23-1046(C) must be analyzed in accordance with the "rational basis" test and it is incumbent upon her to establish that the classification is arbitrary and cannot be justified under any reasonable set of facts. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.E. 1234 (1938).

To determine whether A.R.S. § 23-1046(C) serves any legitimate state interest, it is necessary to consider the purposes of the Workmen's Compensation Act. The Act serves the economic and social welfare purposes of pre-

venting claimants and their dependents from becoming public charges during the period of disability. *Prigosin v. Industrial Commission*, 113 Ariz. 87, 546 P.2d 823 (1976). Thus, A.R.S. § 23-1046(C) reasonably distinguishes between resident aliens who without full benefits are more likely to become public charges, and aliens residing in foreign countries who probably will not. Anther reason which has been cited for the disparate treatment afforded non-resident aliens is "the well-known fact that the cost of living in most foreign countries is substantially less than in the United States. *Continental Casualty Co. v. Industrial Commission*, 63 Utah 334, 336, 250 P. 145, 145 (1926). Finally, as stated in Larson on *Workmen's Compensation Law*, "Most of the special rules [applying to non-resident alien dependents] are the result not of any desire to discriminate but of the awkward problem of proof and continuing administration that is unavoidably present in these cases." 2 A. Larson, *Workmen's Compensation Law*, § 63.51, p. 11-163 (1981).

Petitioner has failed to demonstrate that the classification set forth in A.R.S. § 23-1046(C) has no rational relationship to a permissible state objective. *See McGeorge v. City of Phoenix*, 117 Ariz. 272, 572 P.2d 100 (App. 1977); *Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747 (1974). We therefore conclude that the non-resident alien provision of the Workmen's Compensation Act serves a legitimate state interest and does not violate the equal protection clause.

Petitioner next argues that she has a property interest in the widow's benefits provided by the Arizona workmen's compensation law which cannot be denied her without due process of law. We need not address petitioner's property interest claim, however, because we have reviewed the record and find that, even if petitioner had been denied a

property interest, she was provided with an adequate opportunity to vindicate her factual and legal claims of entitlement to full death benefits. Procedural due process requires nothing more. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

For the reasons set forth, we find A.R.S. § 23-1046(C) is not unconstitutional and the award is affirmed.

DONALD F. FROEB, Judge

CONCURRING:

.....

WILLIAM E. EUBANK
Presiding Judge
Department C

.....

LEVI RAY HAIRE, Judge

In the Court of Appeals
State of Arizona

Division One

1 CA-IC 2417

DEPARTMENT C

ICA Claim No. 449-44-2966

ANDREA CISNEROS JALIFI, widow,
Petitioner,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,
Respondent Employer.

ORDER

The motion for rehearing and responses thereto were considered by the court, Presiding Judge William E. Eubank and Judges Donald F. Froeb and Levi Ray Haire participating.

IT IS ORDERED denying the motion.

DATED this 23rd day of April, 1982.

/s/ WILLIAM E. EUBANK
William E. Eubank, Presiding Judge
Department C

A true copy of the foregoing order was mailed this 23rd day of April, 1982, to:

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April 23, 1982

1 CA-IC 2417

ICA CLAIM NO.
449-44-2966

NO INSURANCE

ORDER

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GLEN D. CLARK, Clerk
By
/s/ JOAN W. HOWARD
Deputy Clerk

[Seal]

Court of Appeals
State of Arizona

Division One

West Wing, State Capitol Building
1700 West Washington Street
Phoenix, Arizona 85007

April 29, 1982

Mr. S. Alan Cook, Clerk
Arizona Supreme Court
201 South West Wing, Capitol Building
Phoenix, Arizona 85007

Dear Sir:

RE: 1 CA-IC 2417
JALIFI v. SKOUSEN
ICA CLAIM NO. 449-44-2966

The Court's OPINION was filed on March 11, 1982.
The motion for rehearing was denied on April 23, 1982.
A timely petition for review was filed April 28, 1982. The record is transmitted to your Court as follows:

X Petition for Review (6)
X ORDER denying motion for rehearing (5)
X RESPONSE/OBJECTION to motion for rehearing (5)
X Motion for rehearing (5) Answering Brief ORIGINAL, Sets 1, 2, 3, 4 and 5
..... Briefs (Opening, Answering, Reply) (6 each)

X Original Clipboard
..... Instruments
..... Minute Entries
X Certified Claims File (one part)
..... Depositions (
..... Reporter's Transcript (
..... Exhibits (

GLEN D. CLARK, CLERK
By
/s/ MURIEL I. HUME
Deputy Clerk

Enclosures (as noted)
c: Mr. Donald F. Schaar
Mr. James A. Overholt, Acting Chief Counsel
The Industrial Commission of Arizona
Mr. Donald A. Fendon
Mr. Lawrence Ollason

[Seal]

Supreme Court
State of Arizona

201-West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

May 12, 1982

Supreme Court
No. 16016-PR

Court of Appeals
No. 1 CA-IC 2417

Industrial Commission
No. 449-44-2966

ANDREA CISNEROS JALIFI, widow,
Petitioner,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,
Respondent Employer.

The following action was taken by the Supreme Court of the State of Arizona on May 11, 1982 in regard to the above-entitled cause:

"ORDERED: Petition for Review—DENIED."

Justice James Duke Cameron voted to grant.

Justice Stanley G. Feldman did not participate in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 12th day of May, 1982.

S. ALAN COOK, Clerk
/s/ By REBECCA SANCHEZ
Deputy Clerk

TO:

Lawrence Ollason, Esq., 182 North Court, Tucson, Arizona 85701

Don F. Schaar, Esq. and J. Terence Fox, Esq., Taylor & Kamper, Suite Three, 3308 North Third Avenue, Phoenix, Arizona 85013

James A. Overholt, Acting Chief Counsel, Industrial Commission of Arizona, 1601 West Jefferson Street, Phoenix, Arizona 85007

Donald H. Bayes, Admin. Law Judge, Industrial Commission of Arizona, 1601 West Jefferson Street, Phoenix, Arizona 85007

Don A. Fendon, Esq., Jerome & Gibson, Suite 710, 11 West Jefferson Street, Phoenix, Arizona 85003

Glen D. Clark, Clerk, Court of Appeals, Division One, State Capitol Building, West Wing, Phoenix, Arizona 85007

LAWRENCE OLLASON
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(602) 624-4477

Attorney for Petitioner

In The Supreme Court
of the State of Arizona

Supreme Court
No. 16016-PR

Court of Appeals
No. 1 CA-IC 2417

Industrial Commission
No. 449-44-2966

ANDREA CISNEROS JALIFI, widow,
Petitioner,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,
Respondent Employer.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the above-named petitioner appeals to the United States Supreme Court, pursuant to 28 USC R57(2), from the order denying review imposed in the above-entitled case, entered by the Supreme Court of the State of Arizona on the 11th day of May, 1982,

on the grounds that said decision deprives petitioner equal protection of the law.

Petitioner herein designates the full written record of all proceedings involving the petitioner or her attorneys from the time of her initial application before the Industrial Commission to the filing of the notice of appeal.

Respectfully submitted this 21st day of July, 1982.

/s/ LAWRENCE OLLASON
Lawrence Ollason, Attorney
for Petitioner

Copy of the foregoing mailed this
21st day of July, 1982, to:

James A. Overholt, Acting Chief Counsel
The Industrial Commision of Arizona
P. O. Box 19070
Phoenix, Arizona 85005
Attorney for Respondent

Don A. Fendon, Esq.
Jerome & Gibson
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11 West Jefferson Street
Phoenix, Arizona 85003
Attorney for Respondent Employer

Glen D. Clark, Clerk
Court of Appeals, Division One
State Capitol, West Wing
Phoenix, Arizona 85007

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Attorney for Petitioner

In the Court of Appeals
State of Arizona

Division One

1 CA-IC 2417

DEPARTMENT C

ICA Claim No. 449-44-2966

ANDREA CISNEROS JALIFI, widow,
Petitioner,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,
Respondent Employer.

AMENDED NOTICE OF APPEAL

PLEASE TAKE NOTICE that Andrea Cisneros Jalifi, the above-named petitioner, appeals to the Supreme Court of the United States from the final order denying review imposed in the above-entitled case, entered by the Supreme Court of the State of Arizona on the 11th day of May, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).
Respectfully submitted this 26th day of July, 1982.

/s/ LAWRENCE OLLASON
LAWRENCE OLLASON,
Attorney for Petitioner

Copy of the foregoing mailed this 26th day
of July, 1982, to:

James A. Overholt, Acting Chief Counsel
The Industrial Commission of Arizona
P. O. Box 19070
Phoenix, Arizona 85005
Attorney for Respondent

Don A. Fendon, Esq.
Jerome & Gibson
Suite 710
11 West Jefferson Street
Phoenix, Arizona 85003
Attorney for Respondent Employer

Office - Supreme Court, U.S.
FILED
SEP 13 1982
ALEXANDER L. S
CLERK

No. 82-245

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

ANDREA CISNEROS JALIFI, WIDOW,

Appellant,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA, and DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,

Appellees.

On Appeal From the Supreme Court of Arizona

Motion to Dismiss or, in the alternative, to Affirm

DON A. PENDON
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No. 82-245

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1982

ANDREA CISNEROS JALIFI, WIDOW,

Appellant,

vs.

THE INDUSTRIAL COMMISSION OF ARIZONA, and DAN SKOUSEN dba SKOUSEN RANCH and/or SKOUSEN FARMS,

Appellees.

On Appeal From the Supreme Court of Arizona

Motion to Dismiss or, in the alternative, to Affirm

MOTION

COMES NOW, the Appellee, Dan Skousen, dba Skousen Ranch and/or Skousen Farms, by his attorney below-named, and pursuant to Rule 16 of the Supreme Court Rules, moves this most Honorable Court to Dismiss or, in the alternative, to Affirm the decision of the Arizona Supreme Court in the above-entitled and captioned matter. The grounds for this Motion are herein below enumerated.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article 1, Section 8(3): The Congress shall have the power...to regulate commerce with foreign nations (4) to establish a uniform rule of naturalization.

Article 2, Section 2(2): The President shall...have power...to make treaties. Tenth Amendment, United States Constitution: the powers not delegated to the United States by the Constitution, nor prohibited by it to the states are reserved to the states respectively, or to the people

Fourteenth Amendment, United States Constitution, Section 1 "nor shall any state...deny to any person within its jurisdiction the equal protection of the laws."

8 U.S.C. Section 1101(a)(20) Immigration and Nationality Act. A.R.S. § 23-901 *et. seq.* A.R.S. § 23-1046(C). N.M.S.A. Section 52-1-52.

GROUNDS FOR APPELLEE'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

I

Based upon the jurisdiction prerequisites of the Fourteenth Amendment, it is manifestly clear that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

II

It is patently clear from the relevant case law, statutes, and treaties, that neither Equal Protection nor Substantive or Procedural Due Process was denied the Appellant in this cause. Accordingly, this case should be dismissed.

Subpart A - Equal Protection Argument

Subpart B - Substantive Due Process Argument

Subpart C - Procedural Due Process Argument

III

The case at bar presents this Honorable Court with a "political question" because the question to be decided is delegated to another branch of the government, thus this court should decline to review this case on the merits.

IV

The form of the Jurisdictional Statement violates Rule 33(5)b of the Rules of this Court and, pursuant to Rule 33(7), this Appellee prays for dismissal of this action.

STATEMENT OF THE CASE

In order to clarify the statement of the case, as presented by the Appellants in this matter, it is necessary to emphasize certain portions of the record from the Court of Appeals and the Industrial Hearing.

Hereinafter, reference will be made to the Appellant's Jurisdictional Statement and the Appendix attached thereto. The Jurisdictional Statement will be referred to by the letters *JS* and the Appendix, attached thereto, will hereinafter be referred to by the initials *JSA*.

At the Industrial Commission hearing, the Appellant, Andrea Jalifi, originally argued that the Amended Award was a violation of the Supremacy Clause because she claimed that she was a "green-carded" alien and that such status afforded her rights and privileges not allowed to non-resident aliens. At oral argument, however, the Appellant stipulated that she was not in fact a green card holder and, therefore, waived the Supremacy Clause argument. *See JSA, page 6.*

The Appellant, in her Statement of the Case, states that the deceased was survived by his wife and three minor children. *See JS, page 3.* The statement leaves this Court with the inference that all four relatives are financially dependent upon the award made to the Appellant. Such is not the case, as can be seen from *JSA, page 5*, wherein the Appeals Court states that two out of the three children had duality of citizenship

and that they were awarded full benefits pursuant to A.R.S. §23-1046(A)5.

On the thirteenth day of August, 1979, the Commission issued a Findings and Award for Death Benefits wherein it awarded Andrea Cisneros Jalifi, the Appellant, the sum of $157.50 per month until her death or remarriage.

Before that award became final, the Commission issued an Amended Findings and Award for Death Benefits on the ninth day of October, 1979, wherein the $157.50 per month award was reduced to $94.50 per month pursuant to the provisions of A.R.S. §23-1046(C). It is important to note that this Amended Award was made *before it became final. See JSA, page 5.*

The Appellant's Statement of the Case implies that the reduction was made arbitrarily, because no reference is made to the fact that the Amended Award was issued before the Award had become final. *See JS, page 3.*

In the Appellant's Statement of the Case, it is set forth that a timely Petition for Special Action followed, and that the statute A.R.S. §23-1046(C), was challenged on the basis of Equal Protection, Supremacy Clause, and Due Process grounds. *See JS, page 3.* As is stated above, the Supremacy Clause argument was waived at the Appeals Court level, *supra.* The Due Process grounds, as a basis for attack on A.R.S. § 23-1046(C), appears to have been abandoned by the Appellant, because in the Statutory and Constitutional Provisions *See JS, page 2,* Equal Protection

is the only specific constitutional provision raised. The Statement of the Case, as set forth by the Appellant is somewhat misleading as to which provisions are being raised on this appeal. *See JS, page 3.*

Since the Appellant's Statement of the Case and Statutory and Constitutional Provisions are unclear, this Appellee argues both Equal Protection and Due Process in this Motion.

The Appellant appeals to this Court as both a citizen and resident of Mexico. The Appellant was not a resident of the United States on the date of her husband's untimely death. In fact, since her marriage to Miguel Jalifi, the Appellant has always resided in Mexico and has never been a citizen of the United States. *See JSA, page 8.*

GROUNDS IN SUPPORT OF APPELLEES MOTION TO DISMISS OR, ALTERNATIVELY, TO AFFIRM

I

Based upon the jurisdictional prerequisites of the Fourteenth Amendment, as applied to the States through its Due Process clause, it is manifestly clear that the questions on which the decision of this cause depends, are so unsubstantial as not to need further argument.

II

It is clear from the history, relevant case law, federal and state statutes, and U.S. Treaties, that the Appellant in this cause has been denied neither Equal Protection nor Due Process and, accordingly, this case should be dismissed.

Subpart A - Equal Protection Argument

Subpart B - Substantive Due Process Argument

Subpart C - Procedural Due Process Argument

III

The case at bar presents this Honorable Court with a "political question" because the matter to be decided is delegated by the Constitution of the United States to another branch of government, thus, the court should decline review on the merits.

IV

The form of Appellant's Jurisdiction Statement violates Rule 33(5)(b) of the

Supreme Court rules and, pursuant to Rule 33(7), this Appellee prays for Dismissal of this action.

ARGUMENT

I

BASED UPON THE JURISDICTIONAL PREREQUISITES OF THE FOURTEENTH AMENDMENT, AS APPLIED TO THE STATES THROUGH ITS DUE PROCESS CLAUSE, IT IS MANIFESTLY CLEAR THAT THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS, ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The Appellant contends that A.R.S. § 23-1046(C) violates the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, as applied to the states through its Due Process clause. *See JS, page 4.*

Mrs. Jalifi's claim is that A.R.S. § 23-1046(C) creates an unconstitutional classification, insofar as non-resident aliens are awarded a lesser amount than resident aliens.

The Fourteenth Amendment provides, in pertinent part, that "No state shall... deprive any person of life, liberty or property without due process of the law; nor deny to any person *within its jurisdiction* the equal protection of the laws". U.S. Const., Amend. XIV. (Emphasis added). The Appellant's reliance on the Fourteenth Amendment is misplaced, since it applies only to "persons within the territorial jurisdiction" of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Appellant contends that she is "within the jurisdiction" of Arizona for Fourteenth Amendment purposes, despite the

fact that she has been, during all the relevant times herein, a citizen and resident of Mexico. In support of this proposition, the Appellant cites *Kentucky Finance Corporation v. Paramount Auto Exchange*, 262 U.S. 544, 550 (1923). *JS, page 5.* The Appellant also cites *Mathew v. Diaz*, 426 U.S. 627 (1976); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); and *Yick Wo v. Hopkins, supra.*

The last three cases are cited for the proposition that because the event giving rise to her claim occurred in Arizona, Mrs. Jalifi may challenge the non-resident classification that withdraws a portion of her otherwise vested claim for benefits. *See JS, page 5.*

The *Kentucky Finance Corporation* case is cited for an erroneous proposition of law, i.e. that if jurisdiction is conferred upon a party to bring a suit within a state, the jurisdiction conferred thereby, is the same jurisdiction that is required to be protected by the Equal Protection clause.

The thrust of the *Kentucky Finance Corporation* case is that if a foreign corporation had its property illegally taken into a state, they should be able to sue in that state's court system without the imposition of additional burdens not imposed on in-state corporations. The issue was equal access to the state's court system; not having anything to do with the substantive rights, as guaranteed by the Fourteenth Amendment, granted resident aliens and citizens. The major policy rationale, as discussed in

that case, was that the legal system should be available to all persons: citizens, resident and non-resident aliens alike, especially where property rights have been deprived.

The Supreme Court held, in that case, that the mere filing of a law suit in a state court was not enough to bring the plaintiff "within the jurisdiction" for that purpose alone. However, the court did not rule that the phrase "within the jurisdiction" for the purpose of a law suit was equivalent to "within the jurisdiction for Fourteenth Amendment Equal Protection purposes.

In *Yick Wo v. Hopkins, supra,* the Appellant's reliance is also misplaced since it applies only to "persons within the territorial jurisdiction" of the United States. *Id.* 369. In the *Johnson* case, cited by the Appellant for the "jurisdiction" proposition, this Court stated that it "has been at pains to point out that it was the aliens' presence within its jurisdiction that gave the judiciary power to act." 339 U.S. 63, 771 (1950).

The common thread running through all of the cases cited by Mrs. Jalifi, is that they refer to *resident aliens.* For instance, in voiding an Arizona law forbidding private employers from employing more than a fixed percentage of aliens, this Court, in *Traux v. Raich,* 239 U.S. 33 (1915), declared that a state may not "deny lawful *inhabitants*...the ordinary means of earning a livelihood." *Id.* at 41. (Emphasis added).

Similiarly, the aliens who challenged the state law in *Graham v. Richardson*, 403 U.S. 365 (1971), were lawfully admitted *permanent residents* who were held to be entitled "to equal protection of the laws of the state in which they *reside*." *Id.* at 41. (Emphasis added).

Thus, the Appellant, as a permanent resident of Mexico, is not protected by the Fourteenth Amendment which "by its own terms, has no application to aliens not within the jurisdiction of the United States." *DeTenorio v. Mogowan*, 510 F.2d 92, 101, *reh. denied*, 513 F.2d 294 (5th Cir.), *cert. denied*, 423 U.S. 877 (1975). Only if the Appellant somehow surmounts this jurisdictional limitation of the Fourteenth Amendment, will it be necessary to treat her contention that A.R.S. § 23-1046(C) creates an unconstitutional classification on the basis of non-resident alienage. This Appellee contends that Mrs. Jalifi has not met the Fourteenth Amendment requirement that the person it protects is to be within the state's jurisdiction and, therefore, this case should be dismissed.

II

IT IS CLEAR FROM THE HISTORY, RELEVANT CASE LAW, FEDERAL AND STATE STATUTES, AND U.S. TREATIES, THAT THE APPLICANT IN THIS CAUSE HAS BEEN DENIED NEITHER EQUAL PROTECTION NOR DUE PROCESS AND, ACCORDINGLY, THIS CASE SHOULD BE DISMISSED.

A. Equal Protection Argument

This Appellee submits that the alleged statutory classification is not based upon

alienage per se, but rather upon the residence of the surviving dependent alien. This is not a law that can be explained only as an alien-based classification. The class of persons entitled to full death benefits under the act is not limited to "citizens". *Aliens are included within the class, so long as they reside within the United States.*

The distinction made in A.R.S. § 23-1046 (C), is between aliens residing in the United States and aliens residing in foreign countries; not between aliens and citizens. A.R.S. §23-1046 *et seq.*

The Appellant alludes to an alleged confusion as to the proper constitutional standard to be applied when statutes classify on the basis of non-resident (as opposed to resident) aliens. This Appellee's position, regarding the proper constitutional standard, is that it is to be tested by the traditional "rational relationship" or "rational basis" standard; not the "strict scrutiny" standard. *Mathew v. Diaz*, 426 U.S. 67 (1976).

It is patently clear that resident-aliens enjoy the "heightened judicial solicitude" of a suspect class and, therefore, any classification of a resident alien is subject to "strict judicial scrutiny". *Graham v. Richardson*, 403 U.S. 365, 372. It is important to review the rationale behind applying this stricter standard to resident aliens.

In *Lehndorff Geneva, Inc. v. Warren*, 74 Wis.2d 369, 246 NW.2d 815 (1976), the Supreme Court of Wisconsin reviewed the

"alien cases commencing with *Yick Wo, supra,* and concluded that the underlying rationale of those decisions turned upon the characteristics of *resident* aliens, who, like citizens, "pay taxes, serve in the military and contribute to economic growth." It is the class of resident aliens and not aliens worldwide who are similiarly situated to citizens with respect to taxes, military services and overall contribution to the country." *Id.* 246 NW.2d at 281. In discussing why a stricter standard is applied to resident aliens, the Court said the following:

> "As residents, these aliens bore the burdens imposed by society, but not the sought-after benefits. Nor could they participate in the political process, which is the normal avenue of redress for a citizen unhappy with governmentally-imposed burden. It is this type of situation, the court repeatedly held, 'heightened judicial solicitude' is appropriate." *Id.* at 822.

The court concluded that non-resident aliens did "not possess the characteristics which warrant heightened judicial solicitude." *Id.* at 824.

Instead, the non-resident aliens were compelled to prove that "the classification is arbitrary and has no rational purpose or relationship to the facts or a justifiable and proper state policy...". *Id.* at page 824-5.

Identically, the Appellant, in the case at bar, shares none of the "duties and

burdens" which resident aliens have in common to the citizens of the United States. Consequently, her challenge to A.R.S. § 23-1046(C), must be measured by the "rational basis" or "rational relationship" standard and it is incumbent upon her to establish that the classification is "arbitrary and capricious." *U.S. v. Carolene Products*, 304 U.S. 144 (1938).

There is an exception to the "rational relationship" or "rational basis" test, which is applied to non-resident aliens, and that is if there exists a treaty between the United States and the foreign country where the non-resident alien resides. *Antosz v. State Compensation Commissioners*, et.al., 130 W.VA 260, 43 S.E.2d 397 (1947) (where a treaty existed between Poland and the United States and the Equal Protection clause was held applicable to the non-resident alien); *Iannone v. Radory Construction Corp.*, 285 App. Div. 75, 141 N.Y.S.2d 311 (1955), *affirmed*, 150 N.Y.S.2d 199, 133 N.E.2d 199 (where the non-resident aliens resided in Italy and a treaty existed between the United States and Italy, the equal protection applied to the non-resident aliens).

The Appellant cites *Vietti v. George K. Mackie Fuel Co.*, 109 Kansas 179, 197 Pac. 881 (1921). If taken in the context used by the Appellant, however, the proposition this case stands for is misleading. The Plaintiffs in *Vietti* were lawful inhabitants of Kansas and, therefore, had the right to invoke the protection of the Fourteenth Amendment. The case had nothing to do with non-resident aliens, as was implied by the Appellant.

The California case of *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491 (1916), upon which the Appellant relies so heavily for the proposition that non-resident aliens are entitled to the stricter standard of judicial review, *See JS, pages 5-6*, is a 1916 case. The date, considered with the fact that the cited portion is dicta rather than the holding, makes the Appellant's argument very weak. *See JS, page 6.*

In the case at bar, the relevant treaty would be between the United States and Mexico, since the Appellant is a citizen of Mexico. At the time of the deceased's injury, there was no treaty with Mexico that gave its citizens equal rights with American citizens to workers' compensation.

The former Treaty of Amnity, 8 STAT. 410, Treaty Series, 2305, Art. 15, gave citizens of Mexico residing in the United States the same rights and privileges that were enjoyed by the United States Citizens. *This treaty was terminated November 30, 1881.* (Emphasis added).

Since no agreement exists between the United States and Mexico, concerning Workers' compensation, A.R.S. § 23-1046(C) does not violate the Supremacy Clause nor the Equal Protection clause by reducing benefits to aliens residing in Mexico.

In *Hampton v. Mow Sum Wong*, 426 U.S. 88, 96 Sup. Ct. 1895 (1976), plaintiffs were aliens *residing in San Francisco*, who challenged the citizenship requirement of the Civil Service Commission. In *Graham v. Richardson, supra*, the plaintiffs were

lawfully admitted aliens. In *Doe v. Plyler*, 458 F.Supp. 569 (1978), the plaintiffs were alien children *residing illegally in this country.* Nevertheless, the court found that they worked "within the jurisdiction" of the United States for purposes of public school assistance. Similiar cases can be cited for any fundamental necessity, i.e. medical benefits, welfare benefits, etc. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

The key element in the above-mentioned cases is that the aliens were, in fact, residing in the United States.

The Appellant cited *Sailer v. Tonkin*, 356 F.Supp. 72 (Virgin Islands 1973), for the proposition that strict scrutiny was applied to non-resident aliens. This contention is erroneous. The federal court applied the "compelling interest" test, thus subjecting the statute to "strict scrutiny" but, once again, the aliens involved were present on the island when the accident occurred.

A.R.S. § 23-1046(C), passes the "rational basis" or "rational relationship" test. It has been held that the purpose of the workers' compensation laws is to prevent a person and his dependants from becoming public charges during the period of disability. *Progisin v. Industrial Commission*, 113 Ariz. 187, 546 P.2d 823 (1976). Aliens residing in the United States are more likely to become public charges than aliens residing in foreign countries. Furthermore, as stated by the Supreme Court of Utah, "the principal reason for the

policy of paying a less amount of compensation to dependants who are non-resident aliens is the well-known fact that the cost of living in most foreign countries is substantially less than in the United States". *Continental Casualty Co. v. Industrial Commission*, 68 Utah 334, 250 P. 141 (1926).

While it may be debatable that the Statute "is wise, that it best fulfills the relevant social and economic objectives that [Arizona] might ideally espouse, or that a more just and humane system cannot be devised, this tribunal may not substitute its own judgment for that of the legislative body." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

The policy reasons which underly A.R.S. §23-1046(C), are not so "patently arbitrary" as to require their rejection. On the contrary, in *DeCanas v. Bica*, 424 U.S. 351 (1975), the Supreme Court upheld a California law prohibiting employers from knowingly employing aliens who are not entitled to lawful residence in the United States, if such employment would have an adverse effect on lawful resident workers. The court reasoned that the state law was "certainly within the mainstream of (its) police power regulation" and was a proper exercise in protection of the states' fiscal interest. *Id.* at 357. For the foregoing reasons, it is respectfully submitted that A.R.S. § 23-1046(C) is not violative of the Equal Protection clause of the Fourteenth Amendment, as it is applied to the states through the Due Process clause.

B. Substantive Due Process Argument.

The Appellant, Mrs. Jalifi, alleges that the non-resident alien classification withdraws a portion of her otherwise *vested* claim for benefits. (Emphasis added).

Although in the Jurisdictional Statement by the Appellant, under Statutory and Constitutional Provisions and Questions Presented, no mention is made of the Due Process clause of the Fourteenth Amendment. *See JA, page 2.* However, under Questions Presented, the Appellant asked a very broad question to the effect of whether the statute in question is constitutionally permissible. *Id.*

Assuming, arguendo, that non-resident aliens are entitled to Fourteenth Amendment Due Process rights, A.R.S. § 23-1046(C) does not implicate any constitutionally protected property in which the Appellant has a legitimate claim of entitlement.

In the Appellant's Jurisdictional Statement, it is alleged that the statute withdraws a portion of "her otherwise vested claim" for benefits. *See JA, page 5.*

The Due Process clause of the Fourteenth Amendment does not *ex propio vigore* extend rights. As a matter of law, property rights are not created by the constitution but, rather, are created and defined by existing rules or understandings that stem from independant sources such as state law. *Board of Regents v. Roth,* 408 U.S. 554, 577 (1972).

In the *Roth* case, this court stated the following:

"To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Id.*

In *Perry v. Sinderman*, 408 U.S. 593 (1972), it was found that a "person's interest in a benefit is a 'property interest' for Due Process purposes if there are...rules of mutually explicit understandings that support his claim of entitlement to the benefits...".*Id.* at 601.

In the case at bar, the relationship between the deceased employee and his employer gave rise to the rules or mutually explicit understandings: that define and control any alleged property interest of the petitioner".

It is clear, that Mrs. Jalifi had no entitlement to death benefits prior to and independant of the death of her husband. The employment relationship, which her husband continued until his death, was purely contractual. Presumably, Mr. Jalifi was aware that his wife was a non-resident alien. He had constructive, if not actual, notice that under the statute she would receive less than full benefits, if he were to die in the scope of his employment.

Nevertheless, he opted to remain subject to the Arizona Workers' Comepnsation Act, thereby binding his wife to his provisions, including A.R.S. § 23-1046(C). In other

words, by accepting the benefits of the Act, the Petitioner's husband, in effect, contracted as to the amount of death benefits his wife, as a non-resident alien, would receive. She may not now complain, since she has no "vested" rights other than the "rules of mutually explicit understandings". These rules and understandings were created by her husband's "contract" and the statutory consequences of that "contract".

In *Fleming v. Nestor*, 363 U.S. 603 (1960), this Court upheld the expungment of Social Security benefits due aliens, who were deported from the United States. The court reasoned that due process bars withholding the benefits under a social welfare program only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification. *Id.* at 611.

> Such is not the case here. The fact of a beneficiary's residence abroad--in the case of a deportee, a presumable permanent residence--can be of obvious relevance to the question of eligibility. One is the benefits which may be thought to accrue to the economy from the Social Security system is the increased overall national purchasing power resulting from taxation of positive elements of the economy to provide payment to the retired and disabled, who might otherwise be destitute or nearly so, and who would generally spend a comparatively large percentage of their benefit payment. This advantage would be lost as to

payments made to one residing abroad. *Id.* at 612.

This court held that the provision of the Act "cannot be condemned as being so lacking in rational justification as to offend the process." *Id.*

The Appellant claims that she has been denied substantive due process of the law. The basis of her claim is that at the time of her husband's death, she had a property right in full widow's benefits which were reduced by the Commission without Due Process of law.

First, the rationale which underlies her claim lacks merit, because although a widow's right to benefits may come into existence at the time of her husband's death, her rights are contingent upon Arizona workers' compensation laws. Such contingencies include, for example, whether she files a claim within the one year period provided by law, A.R.S. § 23-1061. Consequently, the Appellant's property right to benefits does not vest until a final award has been made by the Commission. *Moore v. Industrial Commission*, 24 Ariz.App. 324, 538 P.2d 411 (1975). The Appellant would not have a vested property right in death benefits until a final award is made.

The New Mexico Supreme Court just recently denied a constitutional attack on N.M.S.A., Section 52-1-52, which provides that no workers compensation shall accrue to relatives or dependants not residents of the United States. *Carmen Pedrazza, et. al. v. Sid Fleming*

Contractor, Inc., 94 NM 59, 607 P.2d 597 (1980).

The court held that workers compensation is not a fundamental right or vested property interest for due process purposes and, furthermore, the legislature intended that property rights in workers' compensation claims *never vest* in non-resident alien dependant cases. *Id.* (Emphasis added).

As previously discussed, there is a rationale basis for reducing benefits to non-resident aliens, living in foreign countries. Since such persons are not likely to become charges of the state, it is reasonable that the legislature would reduce benefits. Moreover, benefits under the Arizona statutory scheme are not lost completely. They are merely reduced.

It is not arbitrary and capricious for a legislature to assume that the standard of living, in foreign countries, is lower than that in the United States.

Subsection C.

Procedural Due Process Argument

The Appellant cannot claim that she has been denied procedural due process by the Commission. Her rights to widow's benefits had not vested at the time the Commission entered its amended award, reducing her benefits pursuant to A.R.S. § 23-1046(C). Furthermore, she was given notice and opportunity to be heard, both at the administrative level and at the appeals level, both of which she

exercised.

Thus, any procedural due process violation that the Appellant claims is devoid of merit. This is true because the Commission hearing, and the appeals process, have provided her with ample opportunity to vindicate her legal and factual claim of legal entitlement to death benefits. Procedural due process requires nothing more. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1977).

III

THE CASE AT BAR, PRESENTS THIS MOST HONORABLE COURT WITH A "POLITICAL QUESTION" BECAUSE THE QUESTION TO BE DECIDED, IS DELEGATED TO ANOTHER BRANCH OF GOVERNMENT, THUS, THIS COURT SHOULD DECLINE REVIEW ON THE MERITS.

This Appellee directs the Court's attention to Article 2, subsection 2, of the United States Constitution, wherein the Treaty power is delegated to the executive and legislative branches of government.

The Appellant seeks to have this Court apply the "strict scrutiny" standard when reviewing legislation classifying non-resident aliens. Should this Court accept Appellant's invitation to set a higher standard of review for non-resident equal protection claims, it will have the effect of creating a unilateral treaty, *defacto* with every country in this world, where non-resident aliens dependant upon U.S. residents, are located.

For example, in the instant case, no

treaty exists between the United States and Mexico, as to equal rights to workers compensation. If this Court rules in favor of the Appellant, the effect would be to create a unilateral treaty with Mexico, conferring upon the dependant resident in Mexico equal rights to Arizona workers compensation benefits, but not providing for any reciprocity by the government of Mexico. It is this Appellee's contention, that such a decision should be made by executive and legislative branches of the federal government, by way of treaty, as was done with Poland and Italy. *See Treaty Discussion, supra at II.*

The "political question" doctrine was succinctly stated in *Baker v. Carr*, 369, U.S. 186 (1962), and follows:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional committment of the issue to a political coordinate department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without initial policy of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking an independant resolution without expressing lack of respect due coordinate branches of government...; or the potentiality of embarrassment of multivarious pronouncements by various departments on one question. *Id.*

All of the above factors are present in the case at bar. Thus the Appellee respectfully moves this Court to dismiss the action because there are no justifiable grounds upon which an adequate political question can be decided by this Court.

IV

THE FORM OF JURISDICTIONAL STATEMENT, VIOLATES RULE 33(5)B, OF THE RULES OF THIS COURT, AND PURSUANT TO RULE 33(7), THIS APPELLEE PRAYS THIS HONORABLE COURT TO DISMISS THIS ACTION.

A passing glance at the Jurisdictional Statement -- the Statement of Authorities, revealed that almost all of the cases cited therein by the Appellant, referred to incorrect page numbers.

This error is clearly in violation of Rule 33(5)B and, pursuant to Rule 33(7) this Appellee moves this Honorable Court to dismiss this cause of action.

CONCLUSION

For all of the foregoing reasons, this Appellee moves this most Honorable Court to Dismiss, or in the alternative, Affirm the Award of the Commission, and subsequent holding of the Arizona Supreme Court.

Respectfully submitted this 9th day of September, 1982.

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